

Office - Supreme Court, U.S.
FILED

MAY 23 1957

JOHN T. FEY, Clerk

LIBRARY
SUPREME COURT, U.S.
IN THE

Supreme Court of the United States

October Term, 1956

No. 893
(formerly No. 566 Misc.)

CARYL CHESSMAN,

Petitioner,

vs.

**HARLEY O. TEETS, Warden of the California State
Prison, San Quentin, California,**

Respondent.

PETITIONER'S REPLY BRIEF

GEORGE T. DAVIS
98 Post Street
San Francisco, California
Attorney for Petitioner

CARYL CHESSMAN
Box 66565, San Quentin,
California
Petitioner pro se

ROSALIE S. ASHER
County Courthouse
Sacramento, California
Of Counsel

SUBJECT INDEX

	PAGE
ARGUMENT:	
I. Petitioner did expressly seek the order of the trial court to be produced at the settlement hearing conducted by it	2
II. Petitioner has not waived either his right to be personally present or to be represented by counsel at the trial court settlement proceedings	3
III. Petitioner did suffer demonstrable prejudice by the admitted refusal of the trial judge to produce Petitioner and allow him to participate effectively in, and to be represented by counsel at, the hearings conducted to create, settle and approve the trial transcript to be used on the automatic appeal	5
IV. Whether Petitioner has been denied rights and fundamental safeguards guaranteed him by the Fourteenth Amendment is to be determined by the court from an independent examination of the evidence before it, not by reliance upon prior negative decisions of State courts, nor by adoption of Respondent's casuistic legal philosophy and ingenious but untenable and obstructive legal theories	9
A. The significance of the decisions of the State and lower federal courts	10
B. The "meaning" of previous denials of certiorari	12

V. There is no merit or substance to Respondent's contentions that because the State managed to secure death penalty convictions Petitioner thereby became a dangerous man and hence the denial of constitutional safeguards was justified; that because Petitioner is assertedly a literate person familiar with the law he is not entitled to its protective benefits; and that because Petitioner allegedly "forced" the trial court to proceed as it did he may not be heard to complain of the methods and procedure employed to prepare, settle and approve the trial transcript used on appeal to affirm the death penalty and other judgments	14
VI. Petitioner has not conceded and does not concede the accuracy of the transcript, and the question of due process of law is applicable to that portion of the transcript prepared by Mr. Perry before his death	16
VII. Difficulties the State might encounter in again bringing Petitioner to trial and convicting him present no competent argument why the relief sought, being otherwise proper, should be denied	18
VIII. There was a clear failure of due process in this case when the proper tests for denial of due process of law are applied to the totality of relevant facts before the court	19
The Court's power and jurisdiction to grant the relief sought	26
Conclusion	28

TABLE OF AUTHORITIES CITED

	PAGE
Cases	
Betts v. Brady, 316 U. S. 455	23
Blinn v. Nelson, 222 U. S. 1	25
Brown v. Allen, 344 U. S. 443	12
Buchalter v. New York, 319 U. S. 427	20
Chessman, In re, Crim. No. 5632	3
Chessman, In re, 43 Cal. 2nd 391	10
Chessman, In re, 128 Fed. Supp. 600	11
Chessman v. Teets, 138 Fed. Supp. 761	11
Chessman v. Teets, 221 F. 2nd 276	11
Chessman v. Teets, 239 Fed. 2nd 205	11
Chessman v. Teets, No. 285, Oct. Term, 1954, 348 U. S. 864	3, 11
Chessman v. California, 340 U. S. 840	12
Chessman v. California, 341 U. S. 929	13
Chessman v. California, 343 U. S. 915	13
Chessman v. California, 346 U. S. 916	13
Chessman v. Teets, 350 U. S. 3	11
Dowd v. U. S. ex rel. Cook, 340 U. S. 206	26
El Rio Oils v. Pacific Coast Asphalt Co., 95 Cal. App. 2nd 186	16
Frank v. Mangum, 237 U. S. 309	27
Gibbs v. Burke, 337 U. S. 773	4
Hebert v. Louisiana, 272 U. S. 312	20
Hooven & Allison Co. v. Evatt, 324 U. S. 652	9

	PAGE
McNally v. Hill, 293 U. S. 131	26
Modern Loan Co. v. Police Court, 12 Cal. App. 582	23
H. Moffat & Co. v. Hecke, 68 Cal. App. 35	24
Norris v. Alabama, 294 U. S. 587	9
Ohio Bell Tel. Co. v. Public Utilities Commission, 301 U. S. 292	25
Patterson v. Alabama, 294 U. S. 600	27
People v. Bob, 29 Cal. 2nd 321	20
People v. Chessman, 19 A. L. R. 2nd 1084	19
People v. Chessman, 35 Cal. 2nd 455	10, 12, 15, 19
People v. Chessman, 38 Cal. 2nd 166	10, 13
People v. Chessman, 205 F. 2nd 128	11
People v. Chessman, 218 P. 2nd 769	19
People v. Mooney, 176 Cal. 105	10, 16
People v. Outcalt, 90 Cal. App. 2nd 25	16
People v. Ruiz, 103 Cal. App. 2nd 146	16
Royall, Ex parte, 117 U. S. 241	27
Stembridge v. Georgia, 343 U. S. 541	13
U. S. ex rel. Elliott v. Hendricks, 213 F. 2nd 922	27
U. S. ex rel. Smith v. Baldi, 344 U. S. 561	12

Index

v

PAGE

Constitutions

Constitution of the United States	26
Art. III, sec 1	27
Art. III, sec 2(1)	27
Art. III, sec 2(2)	27
Art IV, sec. 2	27
Fourteenth Amendment	27

Codes

28 U. S. C., Sec. 2254	13
28 U. S. C., Sec. 1254(1)	27
The Law of California—Substantive and Procedural	20

Rules

Rules of the United States Supreme Court:	
40-1(h)	26
California Rules on Appeal:	
35	15
36(b)	15
35(b)	15
33(c)	15
7	15

IN THE
Supreme Court of the United States

October Term, 1956

No. 893
(formerly No. 566 Misc.)

CARYL CHESSMAN,

Petitioner,

vs.

**HARLEY O. TEETS, Warden of the California State
Prison, San Quentin, California,**

Respondent.

PETITIONER'S REPLY BRIEF

This brief is being filed by the Petitioner pursuant to the order of this Court made and entered on April 8, 1957, paragraph three thereof, also pursuant to suggestions made by members of the Court during oral argument on May 13, 1957.

I. Petitioner did expressly seek the order of the trial court to be produced at the settlement hearing conducted by it.

Petitioner *did** expressly and formally request the trial court to order his physical presence at the hearing on the settlement of the transcript. (See Pet. Brief, pp. 26-27). This was done in Petitioner's "Affidavit Responsive to Reporter's Transcript of Proceedings Re Filing of Reporter's Transcript on Appeal" (Pet. Ex. 17). In this affidavit—directed to and filed in the trial court in Los Angeles—the Petitioner clearly and unequivocally requested that he be present at any hearings for the settlement of the transcript.

And Judge Fricke was familiar with this request. When he proceeded to settle the trial transcript in Petitioner's absence, he did so with full knowledge that Petitioner desired and had asked to be present. He testified without qualification in the District Court, before Judge Goodman, "Yes, there *was* such a request made" by Petitioner to be present (H.R., p. 833, Vol. X).

Even prior to this time, in September of 1948, Petitioner had filed his "Affidavit in Support of Request for Prompt Delivery of Trial Record and Need Therefor" (Pet. Ex. 1, Jacket 11), wherein he asked for delivery to him of the "raw" reporter's transcript and made known to the trial court his right to be present

"during all phases of the proceeding affecting his substantial rights, and when he is acting in propria personam."

* Emphasis has been supplied by Petitioner throughout this brief, unless otherwise indicated.

II. Petitioner has not waived either his right to be personally present or to be represented by counsel at the trial court settlement proceedings.

Respondent asserts that Petitioner's claim he was constitutionally entitled to the assistance of counsel at the settlement hearings is "a contention never presented for consideration to the State Court" and hence, Respondent argues, must be deemed to be waived (Resp. Brief, pp. 36-38). "It appears here," Respondent continues, citing an impressive number of cases to the effect that state remedies must be exhausted before the Federal courts may entertain a petition for *habeas corpus*, "that Chessman has adopted a new theory with reference to due process and the right to counsel which was not presented to the California Supreme Court nor to the federal courts" (Resp. Brief, p. 38).

The contention that Petitioner was unconstitutionally deprived of assistance of counsel *has* been made to both the California Supreme Court and the lower federal courts. It was made to the California Supreme Court in a petition for *habeas corpus*, summarily denied (Pet. Ex. 1: records of *In re Chessman*, Crim. No. 5632). When that denial was brought here for review, this Court denied certiorari "without prejudice to an application for a writ of *habeas corpus* in an appropriate United States District Court" (*Chessman v. Teets*, No. 285, Oct. Term, 1954, 348 U. S. 864). Then, in the resultantly filed petition for *habeas corpus* (upon which this certiorari is based) Petitioner expressly alleged (as set out in Petitioner's brief at p. 41) both that "Petitioner was deprived of the right to be

present at the hearing of the settlement of the reporter's transcript on said automatic appeal" and that "said trial court * * * in connection with the matter of the settlement and approval of the reporter's transcript on appeal, and the hearings had thereon, failed, neglected and refused to afford representation to defendant, either by personal appearance of your Petitioner, or by the appointment of a competent attorney-at-law to represent your Petitioner at these vital proceedings in connection with the settlement of said reporter's transcript * * *".

Not only is it true that Petitioner never expressly waived his right to counsel in any of the post-trial proceedings for the settlement of the record, but he was never informed by the trial court that he would not be allowed to appear *in propria persona* nor, that in lieu thereof he would be allowed the right to be represented by counsel. It is the contention of Petitioner that it was the duty of the trial court, since it refused to allow Petitioner to appear in person, to see that Petitioner's rights were fully protected during the settlement hearings by and through the services of an attorney representing Petitioner, and the failure of the trial court in this respect is unequivocal and uncontradicted. In such circumstances, where the accused is defending himself, the trial judge must be particularly watchful to see that he is not overreached nor taken advantage of (*Gibbs v. Burke*, 337 U. S. 773, 781).

III. Petitioner did suffer demonstrable prejudice by the admitted refusal of the trial judge to produce Petitioner and allow him to participate effectively in, and to be represented by counsel at, the hearings conducted to create, settle and approve the trial transcript to be used on the automatic appeal.

Respondent demands rhetorically, as though by the mere asking of the question he entirely demolishes Petitioner's claim of denial of due process:

"Is it not then incumbent upon Chessman to demonstrate to this Court that in some heretofore unexplained manner his personal appearance at the trial transcript settlement proceedings would have enabled him to do more than or other, than that which he did? Is it not further incumbent upon Chessman to demonstrate to this Court that there were other objections not made by Chessman in writing which could have been made with material difference to the case upon appeal?" (Resp. Brief, p. 23).

Petitioner repeatedly has sought to demonstrate in the past that he was prejudiced by Judge Fricke's admitted refusal to produce Petitioner and allow him to participate effectively in, and to be represented by Counsel at, the hearings on the settlement of the transcript. Petitioner could have done what he sought by his motion to the trial court and quoted at page 26 of Petitioner's Brief. He could have established that Stanley Fraser misrepresented his ability to read the deceased reporter's shorthand notes and that those notes are in fact undecipherable in material part. He could have produced other official shorthand re-

porters who had studied the notes and "reached the conclusion that many portions of the same will be found completely indecipherable" (Pet. Brief, p. 22). He could have produced defense witnesses at the trial who were prepared to testify that their testimony as transcribed was glaringly inaccurate. He could have produced trial jurors and others in support of his claim the trial judge had prejudicially instructed the jury to return the death penalty. Given counsel and an opportunity to investigate, he could have produced Mrs. Eva Hoffman and other witnesses and evidence to show that, at the very time Fraser was engaged in working on the transcript, he was so intoxicated as to be mentally and physically incapable of doing such work with any degree of competence; that he was addicted to the excessive use of alcohol, had a long record of arrests for being drunk, and was arrested while he was supposedly actually engaged in the preparation of the record (see Pet. Brief, pp. 33-34).

Petitioner further could have brought out that Fraser was the uncle-in-law of the prosecutor, J. Miller Leavy, a fact kept concealed from Judge Fricke (H.R. 170, Vol. V; 452, Vol. VII); he could have brought out that, at the suggestion of Leavy, Fraser had conferred with two prosecution witnesses, Los Angeles detectives Leland Jones and Colin Forbes, about Fraser's rough draft transcription of their trial testimony, thus permitting their testimony to be reconstructed not only in the absence of petitioner but out of court and secretly (H.R. 592, Vol. VII; 870-871, Vol. X; 396-397, 417-420, Vol. VI; 833, 837, Vol. X); he could have established that Fraser did get Leavy's "corroboration, his ideas, his recollection in places where I had difficulty" (H.R. 339).

Most of the evidence above was concealed from the trial court and from petitioner until the hearings in the District court and was never passed on by the California courts.

Referring particularly to the District Court record, Fraser testified as follows:

That he took his notes to Deputy District Attorney Leavy's home to work on them (Rep. Tr., District Court hearing, p. 321);

That he did not tell Judge Fricke of his relationship to Deputy District Attorney Leavy (*Id.*, p. 322);

That he destroyed the rough draft transcriptions of Perry's notes (*Id.*, p. 329);

That he wanted Deputy District Attorney Leavy's corroboration of ideas, recollection in places where he had difficulty, and sometimes his memory (*Id.*, p. 339);

That he talked to Lt. Jones of the Los Angeles Police Department and Colin Forbes, another police officer, about their testimony in the case (*Id.*, p. 417);

That he wanted to get all the light he could (*Id.*, p. 418);

That Leavy may have been present when he talked to Forbes (*Id.*, p. 419).

None of the above was known to Petitioner until it was brought out in testimony at the District Court hearing as appears by the Petitioner's own testimony therein (*Id.*, pp. 591-592, 595).

Judge Fricke testified in the District Court that if he had known Fraser had seen Jones and Fraser, the matter *would* have been raised at the time of the settlement (H.R. 833, 837, Vol. X). Also Judge Fricke testified before the District Court that "*I wouldn't have hesitated for a moment in revoking any proceedings had up to that time*

if I had found out about it afterwards," referring to Fraser's alleged incompetency as a result of his chronic addition to alcoholic beverages; *"If I had even heard the rumor, I would certainly have gone out and made an investigation to ascertain whether there was any foundation for it or justification for it"* (H.R. 890, Vol. X).

Also having in mind the question asked by this Court as to the portion of the testimony of Leland Jones and Colin Forbes which appears in the first 646 pages as compared to that which appears later, the record shows that these two witnesses testified as follows, references being to the trial transcript:

Colin Forbes: pages 202-206; 462-472; 567-569; 802-809; 831-833; 1008-1011; 1220-1225; 1371-1380; ~~1436-1492~~ (which Petitioner in his list of inaccuracies specifically challenged). * * * It is Forbes' testimony after page 569 (i.e. in the Fraser portion of the record) which is challenged because it deals with Petitioner's alleged confession.

Leland B. Jones: pp. 473-502.

In addition, Petitioner complained about, and could have offered evidence of, the smoothing over of the People's arguments, opening and closing, and the dropping (in the transcript as settled) of prejudicial remarks of the prosecutor and trial judge.

It can be demonstrated mathematically that Petitioner has been materially prejudiced by Fraser's purported transcription of Perry's notes of the trial. Transcribing his own notes before his death, Perry dictated 593 pages from 15 hours and 45 minutes of trial, for an average of 37.7 pages per trial hour. Transcribing Perry's notes, Fraser prepared 1194 pages from 34 hours and 20 minutes of trial, for an average of 34.8 pages per trial hour. Thus,

multiplying 34.33 times 2.9, it will be seen that Fraser has "lost" 99.557 pages of record in his transcription. Considering the serious nature of the due process rights involved, this is too great a loss to be ignored.

IV. Whether Petitioner has been denied rights and fundamental safeguards guaranteed him by the Fourteenth Amendment is to be determined by the Court from an independent examination of the evidence before it, not by reliance upon prior negative decisions of State courts nor by adoption of Respondent's casuistic legal philosophy and ingenious but untenable and obstructive legal theories.

Respondent does not deny that "this is the very first time, after years of litigation, that Petitioner has succeeded in getting all the State court records and other evidence on which the question is based before the Federal Courts." (Pet. Brief, p. 43).

And here "the existence of an asserted Federal right * * * depends upon the appraisal of undisputed facts of record," thus leaving the Court "free to reexamine for [itself] whether the asserted right is to be sustained" (*Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 659).

The guiding and authoritative rule, which Respondent would have the Court ignore, is found in *Norris v. Alabama*, 294 U. S. 587, 590, and has been repeatedly applied in later cases:

"When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms,

but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination will be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured. (Citing cases.)"

A. The significance of the decisions of the State and lower federal courts

So far as is relevant under this heading, all that *People v. Chessman*, 35 Cal. 2nd 455, shows is a *denial* of Petitioner's motions for judicial hearings in the trial court that he might test the questioned ability of the substitute reporter and, by testimonial and physical evidence, prove the gross inadequacies and constitutional infirmities of the uniquely prepared trial transcript.

All that *People v. Chessman*, 38 Cal. 2nd 166, shows is that the judgments of conviction, *with review based upon that transcript*, should, in the opinion of the California Supreme Court, be affirmed. Having accepted the transcript (without giving Petitioner any opportunity to defend against it), the California Supreme Court, on hearing the appeal, was bound by it (*People v. Mooney*, 105, 107-108; and see Point VI below).

In re Chessman, 43 Cal. 2nd 391, deals with the denial of a motion made by the California Attorney General to set aside and vacate a stay of execution granted by Mr. Associ-

ate Justice Carter of the California Supreme Court to permit petitioner to make prompt application for certiorari to this Court (43 Cal. 2nd 296), which was done with favorable results (*Chessman v. Teets*, 348 U. S. 864). The only significance of the opinion in 43 Cal. 2nd 291 is the fixed determination entertained by a majority of the State Supreme Court to see that Petitioner was not given a hearing on his claims dealing with the transcript. By way of contrast, see the separate and opposing view expressed by Mr. Justice Carter in *In re Chessman*, 43 Cal. 2nd 408.

Chessman v. People, 205 F. 2nd 128, and *Chessman v. Teets*, 221 F. 2nd 276, deal only with fragmented aspects of the question, and the facts on which the question was based were not before the Appellate Court. The latter case relied heavily on the former and was reversed by this Court in *Chessman v. Teets*, 350 U. S. 3. *Chessman v. Teets*, 239 Fed. 2nd 205, is the decision and opinion of the Court of Appeals presently before this Court on certiorari. The holdings of the majority and dissenting opinions are considered at pages 41-44, 45-46, 48 *et seq.* of Petitioner's Brief.

There is nothing in these cases to justify Respondent's claim, in effect, that this Court might properly deny relief without reference to the facts because "the courts have displayed a steady unity in refusing (petitioner's) claims." Indeed, these cases, as well as *In re Chessman*, 128 Fed. Supp. 600, and *Chessman v. Teets*, 138 Fed. Supp. 761, present the most persuasive reason conceivable why this Court should decide the question on an independent examination of the evidence.

B. The "meaning" of previous denials of certiorari

Respondent would have it that "the denials of certiorari by this court are of persuasive influence and grounds for denial again" (Resp. Brief, p. 36). No authority is—or can be—cited in support of the proposition.

Respondent relies on a quotation from the late Mr. Justice Jackson to the effect that the minimum meaning of a denial of certiorari "is that this Court allows the judgment below to stand with whatever consequences it may have under the doctrine of *res judicata* as applied by state or Federal courts" (*Brown v. Allen*, 344 U. S. 443, 543, separate opinion of Justice Jackson). In the abstract that is true. But it contributes nothing to the force of Respondent's contention. Justice Jackson was speaking for himself. Mr. Justice Frankfurter, speaking for the majority in the same case, concluded that "in habeas corpus cases, as in others, denial of certiorari cannot be interpreted as an 'expression of opinion on the merits'" (*Brown v. Allen*, *supra*, at p. 497). Or, as was stated in *U. S. ex rel. Smith v. Baldi*, 344 U. S. 561, 565, decided the same day as *Brown v. Allen*, "Our denial of certiorari in habeas corpus cases is without substantive significance."

Respondent also asserts in the heading to the point that "The repeated denials of certiorari are not without meaning" (Resp. Br., p. 36). This is true, but it is not in the way contended for.

Chessman v. California, 340 U. S. 840, sought review of the denial of a petition for *habeas corpus* by the California Supreme Court, as well as indirectly, of *People v. Chessman*, 35 Cal. 2nd 455. *Chessman v. California*,

341 U. S. 929, sought review of a denial by the District Court of a petition for *habeas corpus* and refusal of leave to file a complaint in equity *in forma pauperis*, with the Court of Appeals refusing to allow an appeal on either proceeding. In both cases, it affirmatively appeared that Petitioner's appeal on the merits was still pending. Thus the meaning of the denials was simply that the Court was giving effect to 28 USC sec. 2254; Petitioner had not exhausted his state remedies.

Chessman v. California, 343 U. S. 915, sought writs of certiorari to review the affirmance of the judgments in *People v. Chessman*, 38 Cal. 2nd 166, and the denial of a petition for *habeas corpus*. Earlier the State Supreme Court had ruled that the death of the court reporter or the inability to prepare a trial transcript was not legal grounds for granting a new trial (35 Cal. 2nd at 460). This was an adequate non-federal ground, and consequently, so far as questions were raised concerning the transcript, the Court was precluded from reviewing on the authority of *Stembridge v. Georgia*, 343 U. S. 541, 547-548.

Chessman v. California, 346 U. S. 916, is not conclusive, because this Court later considered another petition for certiorari and, although denying same, did so "without prejudice to an application for a writ of *habeas corpus* in an appropriate United States District Court" (348 U. S. 864). Since, including the present time, the Court has twice granted certiorari, Petitioner cannot believe it would have done so if it felt previous denials and the procedural morass in which Petitioner had been caught were, as Respondent contends, grounds for again slamming the door on Petitioner.

V. There is no merit or substance to Respondent's contentions that because the State managed to secure death penalty convictions Petitioner thereby became a dangerous man and hence the denial of constitutional safeguards was justified; that because Petitioner is assertedly a literate person familiar with the law he is not entitled to its protective benefits; and that because Petitioner allegedly "forced" the trial court to proceed as it did he may not be heard to complain of the methods and procedure employed to prepare, settle and approve the trial transcript used on appeal to affirm the death penalty and other judgments.

Respondent advances the theory that the balance of public safety required that Petitioner be not produced at the settlement hearings. Yet, aside from an implied reference to his convictions, Respondent makes no showing that such theory had any basis in fact. Rather than looking to such theoretical apprehensions, attention should be given to the fact that Petitioner conducted his own trial without hint of incident of such sort; and that, since his confinement in Death Row, he has appeared before the California Superior Court in Marin County, conducting his own legal proceedings, and with his counsel in the United States District Court, and in neither instance can Respondent point to one untoward incident. Moreover, this argument was never suggested to Judge Fricke nor relied upon by him. It must also be noticed that the first time the matter of the preparation of the transcript was brought to the attention of the trial court was on motion for new trial on

June 25, 1948, at which time Petitioner was present; and at that time, Judge Fricke, had he been so advised, could have arranged for Petitioner to be retained in custody in Los Angeles County, thus obviating the necessity of the 400 mile journey from San Quentin, mentioned by Respondent in oral argument.

With reference to the argument made by Respondent that Petitioner could and should have proceeded under Rule 36(b) instead of standing on his rights as prescribed by Rule 35, the following is a complete reply.

Rule 36(b) of the California Rules on Appeal is permissive as to the appellant, as was recognized in *People v. Chessman*, 35 Cal. 2nd 455; but Rules 35(b) and 33(c) are mandatory. If a settled statement is allowed, then Rule 7 is brought into play, and there is required notice, a hearing, and participation by the parties.

But, the Rules aside, Petitioner was never given an opportunity to offer such. Consider the restricted time. Consider his situation, confined in a death cell. Above all, consider that on June 25th, 1948, at the new trial proceedings, Judge Fricke had stated that there was nothing to show that a verbatim transcript could not be prepared. As the testimony before Judge Goodman shows, neither Judge Fricke (H.R., pp. 846-866) nor Petitioner (*Id.*, 591-595) knew of the method employed by Fraser in attempting to decipher and transcribe Perry's notes.

The ineffectiveness of Respondent's statement in its brief (p. 17) relating to Petitioner's being on notice of the possibility of the death of the court reporter is apparent on its face. In reply to this point, Petitioner desires merely to ask that if he was charged with such notice, was not, then, the trial judge likewise charged with notice of his responsibility in such a situation?

VI. Petitioner has not conceded and does not concede the accuracy of the transcript, and the question of due process of law is applicable to that portion of the transcript prepared by Mr. Perry before his death.

Having accepted the trial transcript, the California Supreme Court, on hearing the appeal, was bound by it. (*People v. Mooney*, 176 Cal. 105, 107-108.) So was petitioner. Matters not in that record could not be considered on appeal. (*People v. Ruiz*, 103 Cal. App. 2nd 146, 150, and cases cited; *People v. Outcault*, 90 Cal. App. 2nd 25, 28; *El Rio Oils v. Pacific Coast Asphalt Co.*, 95 Cal. App. 2nd 186, 190.)

Thus Petitioner was confronted with a dilemma. He insisted the transcript was prejudicially incomplete and inaccurate. But he was forced either to prosecute his appeal using the disputed transcript, or to lose the appeal—and perhaps his life—by default, as it were. He chose to prosecute the appeal, and did so with all the vigor he could command. At the same time, he made it plain to the court that he was *not* waiving his previous position as to the grossly inadequate character of the transcript and filed with his opening brief a petition for *habeas corpus* attacking that transcript (see Pet. F.A. 1: Appellant's Opening Brief on Appeal on the merits in Crim. No. 5006, pp. 131-133; Appellant's Closing Brief, pp. 78-82).

Now Respondent attempts to convert Petitioner's legal attack on the death penalty judgments, *restricted as it was to what is shown in the disputed transcript*, into a concession as to the accuracy of the testimony. It plainly appears

Petitioner was conceding nothing; he was simply doing what he had to do: took the evidence as he found it. His arguments for reversal *on the appeal* were restricted to whatever arguments could be based on the evidence appearing in the transcript, however inaccurate it might be. Respondent's argument is an attempt to mislead this Court and to prejudice it by reference to the sex crime testimony.

Respondent knows that Petitioner has consistently and vehemently maintained his innocence (see Petition for Writ of Certiorari, pp. 57-58). He knows that Petitioner insists he was misidentified, not identified. He knows that Petitioner was not claiming in the quoted portions of the briefs that *he, Petitioner*, had not kidnapped the female victims for a purpose other than robbery but was arguing what he believed the evidence showed as a matter of law with respect to the intentions of the *kidnapper*.

Respondent knows further that Petitioner asserts and has sworn that the entire cross-examination of Jarnigan Lea, who testified as to one of the death penalty counts, is missing from the portion of the transcript dictated by Ernest Perry before his death (see Pet. Ex. 11, p. 4 of the "List of Inaccuracies and Omissions in the Transcript;" 35 Cal. 2nd at 473). Petitioner also has claimed and asked for the opportunity to prove that other portions of testimony of prosecution witnesses, as dictated by Perry, are omitted from the transcript. In fact, the question of the completeness and in some instances the accuracy of the first 646 pages of the trial transcript are very much in issue.

VII. Difficulties the State might encounter in again bringing Petitioner to trial and convicting him present no competent argument why the relief sought, being otherwise proper, should be denied.

As Chief Judge Denman observed in certifying probable cause to appeal to the court below (R. 252-254, vol. 1): "Incidentally, it is quite likely that if Chessman had been present at the [settlement] hearing some eight years of appeals, petitions for *habeas corpus*, and more appeals might have been avoided." They almost certainly would have been avoided.

All that Petitioner has sought from the beginning, as the record shows, is a full, fair and decisive hearing on his contentions respecting the transcript, and in California the trial court alone has power to hear and decide questions relating to such a transcript. But that hearing is the one thing the State has refused to give him; even now, almost nine years later, it is the one thing counsel for the State strive desperately to avoid. They go so far as to urge that this Court should go outside of the record and consider the fact certain prosecution witnesses are either dead or unavailable (Resp. Br., pp. 44-45). But difficulties the State might encounter in again bringing Petitioner to trial and convicting him present no competent argument why the relief sought, being otherwise proper, should be denied. Petitioner will be confronted in equal or greater proportion with the same difficulties. His witnesses too have died or become unavailable. The State elected consciously to risk the hazards of a delayed hearing when it knowingly chose the course it continues to pursue.

It is one of the profound ironies of this case that Petitioner requested—and the trial court denied—a daily transcript (Pet. Ex. 1 Rep. Tr. on Appeal, in Crim. No. 5006, p. 54). Such a request is normally granted as a matter of course when a defendant is placed on trial for a capital offense. Petitioner was placed on trial for *three* capital offenses, plus fifteen other serious felonies. Still his request was rejected. Had it been granted, of course, the death of the court reporter after the trial would have created no problem. A transcript would already have been available, and the problem long since decisively resolved.

VIII.. There was a clear failure of due process in this case when the proper tests for denial of due process of law are applied to the totality of relevant facts before the court.

Respondent states: "So far as the *power* of California to provide for the proceeding [and presumably the trial transcript] here utilized there can be no question. The only challenge, of course, lies to the question of the fairness of the procedure"—fairness in its due process sense (Resp. Brief, p. 29).

Petitioner agrees—and thus the merits may be reached. The issue is joined.

A trial transcript, of sorts, was prepared. Proceedings were had to settle it. Over Petitioner's objection, it was accepted by the California Supreme Court for use on the mandatory appeal (*People v. Chessman*, 35 Cal. 2nd 455, 218 P. 2nd 769, 19 A. L. R. 2nd 1084). Thus, since the California Supreme Court was acting within its jurisdiction,

whether as a matter of State law it decided the question of Petitioner's right to be present and participate in the settlement hearings, as well as the question of the validity and accuracy of the transcript, without giving Petitioner any opportunity to defend against it, correctly or incorrectly, justly or unjustly, consistently or inconsistently, its decision recognizedly finally decided these questions and defined Petitioner's rights under State law (*Hebert v. Louisiana*, 272 U. S. 312, 316).

But that decision left this Court with the unimpaired constitutional power, right and duty to inquire and decide whether the result reached, and the manner in which it was reached, has afforded or denied Petitioner due process and the equal protection of the laws (*Hebert v. Louisiana, supra; Buchalter v. New York*, 319 U. S. 427, 429). And, in the circumstances of this case, the decision must be made after, and will be based upon, an independent examination of the evidence (see Point IV above).

Respondent does not deny the force of these controlling rules and principles, but rather seeks to circumvent their proper application. This, as shown above, he may not do. Neither may he contend that because the settlement hearings were essentially appellate in nature they may not or need not be tested by due process standards. Nor may he maintain that due process must accommodate itself to expediency.

To cut brush:

California's automatic appeal law is an "extraordinary precaution" taken by the Legislature "to safeguard the rights of those upon whom the death penalty is imposed by the trial court" (*People v. Bob*, 29 Cal. 2nd 321, 328). (See "A". The Law of California—Substantive and Procedural

—dealing with Review of Death Penalty Convictions by its Supreme Court, Pet. Br., pp. 39-41.) As stated in Petitioner's Brief, at page 53: "California's mandatory appeal procedures were designed to protect Petitioner's rights, not destroy them—and him—through an act over which he had no control, the death of the Court reporter." In other words, this mandatory appeal, like due process itself, is a shield, not a sword.

Respondent does not deny, but seeks to justify, the fact that here "with the death of the court reporter, the record was not and could not be prepared in accordance with any existing law or rule governing appeals and particularly this mandatory appeal. All state-established due process had to be thrown out and an *ad hoc* procedure had to be invented if a record was to be prepared at all" (Pet. Br., p. 40).

Neither does Respondent deny that such a record was prepared by "human ingenuity" in the manner shown in Petitioner's Brief and over Petitioner's objections. Here, it bears repeating, the prosecutor had sworn to the California Supreme Court that Petitioner would have the disputed transcript delivered to him "in court" and that Petitioner would be allowed to present his objections to it at that time (Pet. Ex. 1, Jacket 11, Respondent's Points and Authorities in Opposition to Petition for Writ of Prohibition, with Exhibits Attached, affidavit of J. Miller Leavy dated November 3, 1948). Here, too, the trial court had informed Petitioner "that there can and will be a *hearing* for the settlement of the transcript" (Rep. Tr. April 11, 1949, Pet. Ex. 1, Jacket 3). And here (Pet. Ex. 1, Jacket 11, Respondent's Points and Authorities in Opposition to Petition for Writ of Prohibition, with Exhibits attached), Petitioner had taken the following steps:

On June 30, 1948, while still in Los Angeles, on the same day as filing his notice of appeal, Petitioner sought a "true, complete and certified record" as being necessary to present his appeal;

On September 13, 1948, in his "Affidavit in Support of Request for Prompt Delivery of Trial Record and Need Therefor," he stated that he did not believe it legally proper for any process to complete the transcript be taken "unless affiant is personally present and only after he has read the 'raw' transcript", and asking that he be promptly furnished with the "raw" transcript and not a transcript which had been "modified, changed, or tampered with;"

On April 20, 1949, Petitioner asked the Superior Court to produce him at the settlement hearings (Pet. Ex. 17, Affidavit Responsive to Reporter's Transcript of Proceeding Re Filing of Reporter's Transcript on Appeal), and made a similar request to the State Supreme Court;

Subsequently, he filed with the trial court his list of inaccuracies and omissions (Pet. Ex. 1, Jacket 3, Defendant-Appellant's List of Inaccuracies and Omissions in the Record), and still later a revised list (Pet. Ex. 1, Jacket 3, Defendant-Appellant's Revised List of Inaccuracies and Omissions in the record, in which documents he sought to bring to the attention of the court, among other things, that the arguments of the prosecutor were not complete, that objectionable and prejudicial matter was weeded out, and that portions were seriously modified and changed, and he also specifically made reference to the instruction, missing in the transcript, in effect directing the jury to bring in the death penalty.

Here, too, Petitioner had motioned to be produced that he might test the questioned ability of the substitute re-

porter to decipher the notes and to offer a showing that the transcript was prejudicially incomplete and inadequate.

But, as the record shows, Petitioner *was not* produced. Neither did the Court offer to appoint counsel, or even inquire of Petitioner whether he desired counsel. The substitute reporter was called and testified, crucial issues of fact were determined adversely to Petitioner, and the transcript was settled and approved at *ex parte*, but in reality adversary, hearings, conducted in the absence of Petitioner or anyone acting in his behalf. Petitioner was not then *or ever* permitted to defend against the use of the transcript. Neither had he been given any voice in the selection of the substitute reporter or the means employed to prepare the transcript.

Whether Petitioner has been denied due process is to be determined from the totality of the facts in this case. (*Betts v. Brady*, 316 U. S. 455, 462.) At pages 45-56 of his brief, Petitioner made a careful showing why, in the circumstances of this case, he was constitutionally entitled to be personally present and represented by counsel at, and to participate effectively in, the trial court settlement hearings. Having been sentenced to death, Petitioner had a substantial right to an appeal to the California Supreme Court upon a certified trial transcript of the entire record. The settlement hearings would determine Petitioner's right to such an appeal. No one, the California courts have recognized, "consistent with constitutional safeguards, can be deprived of the possession or title to property, *or any other substantial right*, without reasonable notice and an opportunity to be heard." (*Modern Loan Co. v. Police Court*, 12 Cal. App. 582, 587.) Here Petitioner was given no opportunity, in the judicial sense, to be heard, although

such an opportunity is an essential element of federal due process. "It is essential to the validity of the statute"—and, it necessarily follows, proceedings held under it—"that it furnish the means whereby one may enforce his constitutional rights." (*H. Moffat & Co. v. Hecke*, 68 Cal. App. 35, 39.) Here Petitioner could have enforced his constitutional rights by being produced at the settlement hearing. Respondent has at no point questioned that the trial court had the power and legal authority to produce him.

Under the cases cited at pages 47-48 of Petitioner's Brief, the settlement hearing order creating, settling and approving the transcript is wanting in due process and must be set aside.

In his "A Discussion of the Relief Requested by Petitioner", Respondent asks: "What possible purpose could a second hearing serve in the face of the demonstrated inability of Chessman to present anything beyond the wildest and most unsupported allegations?" (Resp. Br., p. 44).

Petitioner's allegations are neither wild nor unsupported. The short answer to the question is that a trial court hearing will serve to satisfy due process, while a denial of relief will serve only to satisfy California's determination to see Petitioner put to death at all costs. Judge Goodman possessed no power to settle or correct the record; the trial judge does have. Judge Goodman refused to permit the substitute reporter's ability to be tested or his competence to be challenged; a trial court hearing would permit these questions to be resolved; it would put to rest whether the deceased reporter's notes can be transcribed and whether Stanley Fraser is capable of transcribing them.

Judge Goodman stated that Stanley Fraser "could have been the most incompetent reporter in the world and could have made a mess of the transcript in typing it, and that does not raise any federal question. The State of California and the parties to that litigation could determine that" (H.R. 249, vol. V). But no such determination will ever be made unless this Court grants the relief Petitioner seeks.

Judge Goodman added: "• • • but what the State of California affords by way of methods of providing a transcript is not the subject or concern of this court" (H.R. 250, vol. V). But it is now the subject and concern of this Court.

Thus, it is apparent that Petitioner's prayer in the alternative for a trial court hearing does not "play a game with the Court." Rather it is Respondent who plays a forensic shell game with the facts:

While "Constitutional law like other mortal contrivances has to take some chances," (*Blinn v. Nelson*, 222 U. S. 1, 7), the risks it takes are calculated ones. It does not recklessly gamble with human life or liberty. When, in the circumstances disclosed, power to create and settle the record has been exercised so freely, the inexorable safeguard of a fair and open hearing with Petitioner allowed to participate effectively or to be represented by counsel, should be maintained in its integrity. The right to such a hearing is an obvious rudiment of fair play which should and must be afforded to Petitioner under the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency when that minimal requirement, as here, has been neglected or ignored. (See *Ohio Bell Tel. Co. v. Public Utilities Commission*, 301 U. S. 292, 304-305.)

These settlement hearings were in the appellate procedure, yet not truly of it, since issues of fact and not sterile questions of law were there determined. But no matter how they are regarded, it remains uncontrovertibly true that they are a part of the guilt-determining process established by the State of California—A vital part of the state process. To maintain the traditional integrity of the process of determining guilt or innocence, the integrity of all of the component steps must likewise be maintained.

**The court's power and jurisdiction to grant
the relief sought**

This Court's Rule 40-1(h) required Petitioner to include in his brief, "A conclusion, specifying with particularity, the relief to which the party believes itself entitled."

This was done (Pet. Br. pp. 57-58).

Respondent now advances an extraordinary claim: "The relief requested that Petitioner be discharged is, we submit, beyond the jurisdiction of this Court" (Resp. Br. p. 44).

Dowd v. U. S. ex rel. Cook, 340 U. S. 206, refutes such unsupported and unsupportable claim. Congress had granted to the United States District Court the power, in *habeas corpus* proceedings, to "dispose of the matter as law and justice require (28 U. S. C. sec. 2243). The traditional and historic function of *habeas corpus* is to inquire into the legality of the detention; and if it is found that the Petitioner is presently held in custody in violation of the Constitution of the United States, he is entitled to be discharged (see 28 USC sec. 2241(3); *McNally v. Hill*, 293 U. S. 131; *Dowd v. U. S. ex rel. Cook*, *supra*; *Frank v. Man-*

gum, 237 U. S. 309, 331; *Ex parte Royall*, 117 U. S. 241, 249; *Patterson v. Alabama*, 294 U. S. 600). This matter was exhaustively considered and put to rest by the Third Circuit in the recent case of *U S. ex rel. Elliott v. Hendricks*, 213 F. 2nd 922, 924-929.

The ultimate judicial power of the United States resides in this Court (United States Constitution, Art. III, sec. 1). It has appellate jurisdiction of this case, *both as to law and fact* (United States Constitution, Art. III, sec. 2(1) and (2); 28 USC sec. 1254(1); see Jurisdictional Statement, Pet. Brief, pp. 5-6). And in the lawful exercise of its supreme judicial power and appellate jurisdiction, the Court further has the right and duty to determine conclusively whether Petitioner has been deprived of rights guaranteed him by the Fourteenth Amendment. Otherwise the supremacy clause of the United States Constitution (Art. IV, sec. 2) would be meaningless.

Thus Respondent may not seriously maintain the Court lacks either the power or the jurisdiction to reverse (or vacate), with appropriate directions, the judgment of the Court of Appeals which affirmed the order of the District Court discharging the writ of *habeas corpus* previously granted, and to find the trial court's order creating, settling and approving the trial transcript, as well as the California Supreme Court's affirmance of the judgments of conviction—based as they were upon that transcript—are void and hence that they must be set aside. Neither may Respondent seriously maintain the Court lacks either the power or jurisdiction to "hold that, in the circumstances of this case," as set out in the paragraph numbered three (Pet. Brief, p. 57), "Petitioner had a constitutional right under the Fourteenth Amendment to be personally pres-

ent and represented by counsel at, and to participate effectively in, the proceedings in the State trial court to create and settle the uniquely prepared reporter's transcript to be used on the automatic appeal," and then to rule, in the alternative, in the manner sought in the paragraph numbered four (Pet. Br., p. 57), and thus give its findings, holdings and judgment force and effect.

This, Petitioner submits, is what law and justice require.

CONCLUSION

The specific relief sought at pages 57-58 of Petitioner's brief should be granted. As shown above, nothing Respondent has advanced compels a contrary conclusion.

Dated: May 17, 1957.

Respectfully submitted,

GEORGE T. DAVIS

Attorney for Petitioner

CARYL CHESSMAN

Petitioner pro se

ROSALIE S. ASHER

Of Counsel